First Principles.

NATIONAL SECURITY AND CIVIL LIBERTIES

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LAWSUITS AGAINST THE INTELLIGENCE COMMUNITY

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By Christine M. Marwick

Coming: May: Espionage Laws

In The News

March 8, 1976 Henry Kissinger and administration spokesmen denied charges of having authorized "self-serving" leaks which appeared in an article containing highly-classified diplomatic information and praising Kissinger's skill as a diplomat. State Department officials indicated that the leak was "being looked into." (*Washington Post*, 3/9/76, p. A1)

March 11, 1976 The Senate Intelligence Committee released Richard Nixon's answers under oath to 77 questions put to him by the committee. The former President asserted that "there have been — and will be in the future — circumstances in which presidents may lawfully authorize actions in the interests of the security of this country, which if undertaken by other persons, or by the President under different circumstances, would be illegal." In commenting on the answers Senator Church noted that they reveal "attitudes which represent a dangerous departure from this country's first principles."

March 12, 1976 An RCA Corporation executive told a House subcommittee on government and civil rights that he gave the Army permission to monitor all international cable traffic on his company's lines in 1947, because "the Cold War was getting very hot." (*Chicago Tribune*, 3/12/76, p. 10)

March 18, 1976 The Justice Department, at the request of columnist Joseph Kraft and under the directions of Attorney General Levi, destroyed the files of the contents of an electronic surveillance conducted in 1969. Levi acted after concluding that the Privacy Act requires the destruction of these records since they were gathered in violation of the First Amendment.

March 19, 1976 President Ford directed the Domestic Council Committee on the Right of Privacy to conduct a comprehensive study of the issues of information policy, including the consequences of the economy's growing information sector, the impact of computer technology, and the relationship between privacy and freedom of information.

March 28, 1976 FBI records made public through a Socialist Workers Party lawsuit revealed that, contrary to the Justice Department's earlier assertions, federal agents burglarized the party's New York offices at least 92 times from 1960 to 1966, to copy documents and letters covering all aspects of the party's business. (3/29/76, *New York Times*, p. 1)

In The Congress

March 3, 1976 Over the objections of liberals, the House voted to broaden the subpoena powers of the Ethics Committee in its investigation into the leaking of the Pike Committee's intelligence report. The Ethics Committee now has authorization to subpoena and question individuals not directly connected with the government, as well as members, officers, and employees of the House. (*New York Times*, 3/4/76, p. 1)

March 23, 1976 A bill requiring warrants for some national security wiretaps was introduced with support of Attorney General Levi in the House (H.R. 12750) and the Senate (S. 3197).

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.
THOMAS PAINE

In The Courts

January 30, 1976 *Richardson v. Spahr*, Civ. nos. 75-297, 75-298, 75-712 (W.D. Pa.) In an FOIA suit for CIA financial records, government motions for summary judgment was granted on the basis that Congress had approved the *"secrecy involved in funding and operating intelligence operations,"* and that *"public disclosure of those materials classified as 'secret' would cause serious damage to our national security."* Thus exemptions (b)(1) and (b)(3) apply.

February 11, 1976 *Field Enterprises Inc. v. F.B.I.*, No. 76 C 497 (N.D. Ill.) Publishers of the *Chicago Sun-Times* and *Daily News* filed suit seeking access to FBI records of the 1953-1954 surveillance of J. Robert Oppenheimer, father of the atomic bomb. The suit charges that the FBI failed to respond within the FOIA's statutory time limit. *Sun-Times* associate editor Stuart Loory, who filed the original request, revealed in December that the FBI had bugged conversations between Oppenheimer and his lawyers in late 1953.

March 5, 1975 *Bennett v. Dept. of Defense*, 75 Civ. 5005 (LFM) (S.D.N.Y.). In a memorandum in support of a motion for summary judgment in an FOIA case the government argued that documents related to illegal or unconstitutional activity can be properly classified if release would cause damage to the national security: *"There is simply no relationship between the propriety of a national security classification which relates to the external relationships of the United States and the concept of constitutional illegality which relates to the internal affairs of this country. It may well be that the national security of this country could be aided by acts which violate our Constitution."*

March 5, 1976 *Military Audit Project v. Bush*, Civ. No. 75-2013 (D.D.C.) memorandum and order. In an FOIA case for contracts related to Glomar Explorer, Judge Gesell rejected a government motion to submit *ex parte in camera* affidavits. Expressing strong distaste for an *ex parte* proceedings, the court ordered the government to publicly file a complete affidavit justifying the claimed exemptions.

March 10, 1976 *Dellums v. Powell*, Civ. No. 2271-71 (D.D.C.) memorandum and order. Court ordered access to Nixon papers in a damage suit holding that *"the showing made by plaintiffs completely overcomes whatever presumptive executive privilege may attach to the former President's interest in the tapes."*

March 10, 1976 *Halperin v. Kissinger* (D.D.C. 1187-73). Deposition of Richard Nixon released in a civil suit arising out of a warrantless wiretap. The former President conceded that much of the information reported to the White House from the surveillance was not appropriately intercepted or reported.

March 17, 1976 *Berlin Democratic Club v. Rumsfeld* Civ. No. 310-74 (D.D.C.) memo and order. (See article on p. 3). In a far-ranging opinion denying a government motion for dismissal or summary judgment in an ACLU case involving Army surveillance of civilians in Germany the court held that *"a warrant based on probable cause is required for electronic surveillance by the Army of American citizens or organizations located overseas when there is no evidence of collaboration with or action on behalf of a foreign power."*

March 23, 1976 *Blom v. Kelley*, Civ. No. 75-2131 (D.D.C.) order. In an FOIA case for FBI personal files, Judge Pratt, ordered the government to submit requested documents for *in camera* inspection. The government then submitted the file with sixteen deletions, whereupon the court ordered the submission of the deleted material. In requesting a stay of this order the government cited with approval Judge Gesell's order in *Military Audit Project* (see above).

March 24, 1976 *Middendorf v. Henry*, 425 U.S. ___ (No. 74-175). Neither the Sixth nor the Fifth Amendments empower the courts to overturn the congressional determination that counsel is not required in a summary court-martial.

March 24, 1975 *Greer v. Spock* 425 U.S. ___ (No. 74-848). Upheld ban at military base on political speeches and requirement for prior approval for distribution of literature. *"There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to loyalty, discipline, or morale of troops on the base under his command."*

March 25 & 26, 1976 *Alliance to End Repression v. Rochford*, No. 74 C. 3268 (N.D. Ill.). In a Chicago "Red Squad" lawsuit Judge Alfred Y. Kirkland (1) certified the suit a class action (all those subjected to Red Squad tactics) and (2) that, subject to a protective order, the "informer's privilege" did not apply and the Chicago Police must submit to plaintiffs deletion-free red squad files.

March 29, 1976 *Holly v. Acree*, Civ. No. 75-2116 (D.D.C.) Memo and Order. In a Freedom of Information Act lawsuit, Judge William Bryant held that Bureau of Customs refusal to turn over an investigative report dealing with the alleged detention and mistreatment of plaintiff Holly by customs officials "raised questions as to whether agency personnel acted arbitrarily or capriciously." The Civil Service Commission was ordered to determine whether disciplinary action was warranted. The Court ordered release of most of the material by the government.

In The Literature

In the Literature appears on page 13.

Using Civil Litigation to Protect Constitutional Rights

American Civil Liberties Union Class Action Suits

BY CHRISTINE M. MARWICK

Introduction

Only a few years ago the suggestion that agencies of the federal government were undermining constitutional rights in systematic programs of political surveillance and harassment would have been dismissed by most citizens as clear paranoid fantasy. Today, it has become a matter of public record.

The American Civil Liberties Union is representing the victims of a number of these programs — mail openings, military interference with Americans abroad, COINTELPRO, the Internal Revenue "Special Services Staff" for harassing dissident groups, the CIA's Operation CHAOS, and the National Security Agencies "Project Minaret" watchlist surveillance of all overseas phone and cable communications.

In these suits discussed in this article, some of the known victims of these programs have filed suit on behalf of themselves and "others similarly situated"; if such a case wins certification as a "class action" the results of the suit will apply equally to all members of the particular class, to all people who were also subjected to that particular surveillance and harassment program. Since most of these people do not even know for sure whether they were subjected to these programs, they might otherwise never know why it was that their lives went awry, or why they began receiving poison pen letters or special scrutiny of their tax records; and they may never know that they have legal recourse in court.

These ACLU surveillance cases have a number of things in common. Each addresses a now well-known and specific program of governmental misuse of secret power. Yet in none of these (with a single partial exception, discussed below) has the government taken any steps to redress the wrongs involved.

Rather, the government has encouraged the impression that there have been major changes. A few of the inner Nixon White House — but no intelligence community officials — have been prosecuted; a few of the older officials have thought it opportune to retire; the FBI has offered a few of the appearances of cleaning its own house; and the Ford administration has promulgated an Executive Order (discussed at length in last month's *First Principles*) which it has labeled a program for reform but which is nothing more than a reiteration of intelligence community power.

All that the executive branch has offered the nation to stand as a bulwark between a history of abuses of secret powers and a future possibility of their return is the facile assertion that Watergate has somehow turned all American officials into automatically honorable men who can again be trusted with vast power. It is as though the mere cataloguing of the follies of the intelligence community is all that is needed to effect reform. It is not.

Even after being caught in the act, the executive

ACLU Class Action Suits for Political Surveillance

— Illegal Mail Opening
Driver v. Helms, Civil Action No. 75-0224 (D.R.I.)

— Violation of Constitutional Rights of U.S. Citizens Abroad
Berlin Democratic Club v. Rumsfeld, Civil Action No. 310-74 (D.D.C.)

— COINTELPRO
Kenyatta v. Kelley, Civil Action No. 71-2595 (E.D. Pa.)

— IRS Political Harassment
Teague v. Alexander, Civil Action No. 75-0416 (D.D.C.)

— CIA Operation CHAOS and NSA Project Minaret
Halkin v. Helms, Civil Action No. 75-1773 (D.D.C.)

branch agencies have shown themselves remarkably reluctant to enforce the rights of citizens. As yet, no criminal indictments have been brought for intelligence community actions which, if they had not been carried out by ordinary individuals rather than by government officials, would have brought swift prosecution. The nation is now experiencing another failure of the criminal justice system to enforce the laws in an even-handed way.

To provide serious safeguards for basic political rights, there must be some kind of enforcement. Without it, laws are only a rhetorical exercise. The Bill of Rights and statutes have been there all along for officials to read, but instead of serving as a basis for open and democratic government, they served as a list of activities which had to be concealed from Congress, the courts, and the public.

The executive branch shows little interest in reducing the power of its intelligence arm, but alternative avenues for reform remain. As the Steel Seizure Case (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952]) established, the legislative branch of government has the power to devise reforms. It could establish restrictive new charters, build in safeguards, provide for effective law enforcment against intelligence community breaches of the public trust, and make it easier to use civil suits where government abuse of power is charged. But the results in Congress are slow indeed — reform is bogged down in committees, in disputes, in increasing indifference, and in the appearance of reform.

But a third avenue for effecting reforms does remain open and viable in the interim — the judiciary.

While the citizen must wait patiently for a reluctant Justice Department to bring criminal indictments and to establish that officials are not above the criminal law, the route through civil court is open to the individual's initiative. Even if the executive branch does not see the prosecution of executive branch officials as their mission, and even if the Congress does not immediately take back the authority which it has ceded to the presidency over the last forty years, the courts have retained an interest in enforcing the laws. Individuals can use the judicial system to provide civil remedies for the abuses of the intelligence community. They can sue for a redress of grievances.

Regardless of what comes out of Congress and regardless of what kinds of steps the executive branch does or does not take at self-policing, civil actions can serve as a warning to officials that they cannot count on being above the law and that there are stronger sanctions than embarrassment which can be brought into play. The situation looks promising. The courts, as well as Congress, have begun to take skeptically the claims of the executive branch agencies about what either the national security or the domestic security actually requires.

The Civil Lawsuit as a Tool for Reform

Civil litigation provides four main tools for remedying the abuses of power which the intelligence community has been able to practice in secrecy. First, a court can order discovery of the facts surrounding a particular case; second, it can issue declaratory and injunctive relief; third, it can order the destruction of illegally gained files; and fourth, it can award punitive and compensatory damages to the victims of an illegal program.

Discovery. With the congressional investigations now ended, the discovery proceedings in suits like these provide the only official source of information about the inner workings of the intelligence agencies. *Kenyatta v. Kelley*, for example, is responsible for bringing to light the existence of COINTELPRO-Black; civil litigation can be important for penetrating the secrecy which undermines efforts to hold the intelligence community accountable for their programs. Once a court grants discovery to a plaintiff, the agency's ability to conceal has ended; such orders remind officials that they are in fact accountable to the law.

There are several catch-22's involved with discovery, however. Sometimes discovery is granted with a protective order which prohibits making public any of the information which is gained — even if the information shows clearly illegal behavior. Without public awareness, the importance of the information in generating momentum for reform is lost.

There are also a few special pitfalls awaiting the plaintiffs in cases where the government makes a "national security," "executive privilege," or "state secrets" claim. The government, for example, often tries to get around the adversary process by claiming that the documents contain such sensitive information that they must be submitted to the judge alone without the plaintiffs' attorneys present (*ex parte in camera* proceedings). Such tactics not only keep the information from the public; they also deny the plaintiffs the representation of counsel and have been used to slow down the litigation process and to increase the plaintiffs' costs.

The information about the intelligence agency activities which will emerge in suits such as these will, in a sense, continue the intelligence investigations and generate a more comprehensive understanding of the way in which the intelligence community operates. This is essential for devising structural safeguards in order to prevent the recur-

rence of such programs. The continuing list of disclosures will fuel the movement on Capitol Hill to enact legislation to deal with these sorts of problems.

For example, the information which lawsuits (e.g. *Halperin v. Kissinger*) have brought out about warrantless "national security" wiretapping has brought the Justice Department around to the position that it must join with the congressional momentum for requiring court orders on even "national security" taps.

Declaratory and injunctive relief. Until a court makes a determination of whether a given action is illegal, all you have are the — possibly conflicting — opinions of lawyers as to the legality of a program. A declaratory judgment makes the illegality of a given program unequivocal; an injunction places court ordered sanctions as a bulwark against such programs being resumed.

Destruction of Files. The information which was collected, unrestrained by considerations of either legality or accuracy, continues to circulate through various government agencies. Attorney General Levi has so far taken the only governmental steps toward dealing with this kind of problem; he has agreed to destroy the files of the electronic surveillance of columnist Joseph Kraft and to set up a committee to review the COINTELPRO files and to notify the program's victims. Once Levi's April 1st Directive has been implemented people will no longer have to second guess whether they were COINTELPRO victims or have to risk opening an FBI file on them in order to find out what the Bureau has on them. But unlike a court order, this notification is not mandatory — the Directive provides for exceptions; nor does it, apparently, put a time limit on how soon this review must be completed.

The Levi directive is unfortunately only an isolated and partial response. As the ACLU litigation shows, the government continues instead to defend in court its past activities, including its right to maintain and disseminate files which contain information acquired under discredited programs. Yet, in representing the defendants in these suits, the Justice Department has overlooked this. It has taken the position instead that, since the agencies now promise not to carry out any more improper activities, the issues are moot. There is now no need, they assert, to litigate, no need for the courts to interfere by saying quite clearly that claiming a "national security" override of the Constitution is simply illegal.

Present law provides no established channels which can function as an alternative to court action for destroying illegally obtained records. The Freedom of Information Act gives people access to their investigatory records, but any information which could, for example, lead to an informer's identity is exempt. The Privacy Act exempts investigatory records from its provisions for correcting records.

In an effort to call Ford's attention to this kind of problem, the American Civil Liberties Union, the Center for National Security Studies, and five other organizations sent a joint letter to President Ford on October 30, 1975. The letter asked that Ford have those people who have been victims of illegal actions or actions which have violated agency charters notified of the fact. The victims, the letter stated, should be advised that they do have recourse under the law, that they have a legal right to sue in court for damages and for the destruction of the files. Ford, however, has not responded to this letter.

Damages. These ACLU class action suits ask for punitive and compensatory damages for the injury from the surveillance — both to dissuade officials from taking such actions and to compensate the victims, many of whom had their lives severely disrupted and all of whom have been deprived of their constitutional rights. The fact that officials might end up being liable for damages, regardless of whether the Justice Department seeks an indictment, is one of the major disincentives for officials contemplating stretching their interpretations of what might be legal.

But there is an additional complication in the issue of damages; under federal statute, a plaintiff can sue in federal court only if the damages amount to at least $10,000 — the "jurisdictional amount." The difficulty in litigating these cases is establishing what constitutes injury to an abstract value, such as freedom of speech, and what that injury is worth in dollars and cents. New legislation could relieve litigants of much of the ambi-

guity by determining that the values in the Bill of Rights are automatically equal to the jurisdictional amount or specify, as in the wiretapping provisions of the Omnibus Crime Control Act, penalties for infringing on constitutional rights which would provide a clear jurisdictional basis for a suit.

The case of *Laird v. Tatum*, 408 U.S. 1 (1972) is part of the problem surrounding the question of damages. There the Supreme Court held that the suit was not justiciable because plaintiffs did not prove specific injury from the military surveillance program which had collected information on them from public sources. The plaintiffs had asserted that surveillance had a chilling effect on their exercise of First Amendment rights, but the court found that going to court in a case which publicized their political views meant that there had been no "chilling effect." The net effect is to narrow severely the kinds of cases that can be brought before the courts for redress. All of the ACLU cases discussed in this article are distinguished from *Tatum* in that the information was obtained from illegal surveillance and used to harass, disrupt, and discredit the personal and professional lives of the victims.

Bivens v. Six Unknown Federal Agents, 403 U.S. 388 (1971) sets, by contrast, a favorable precedent for litigating suits charging political surveillance. In *Bivens*, the Court held that officials who had violated a plaintiff's Fourth Amendment rights could be held liable for money damages. Other courts have since held that violation of First and Fifth Amendment rights also entitles the victim to an award of damages. In the *Berlin Democratic Club* case discussed in this article, it was held for the first time that the *Bivens* principle is applicable as well to violations of the attorney-client privilege protected by the Sixth Amendment right to a fair trial.

The awarding of attorney's fees and court costs are an important corollary in the award for damages. Given that litigation is exceedingly expensive and drawn out, if this kind of litigation is to be an effective tool for protecting constitutional rights, the plaintiffs must be able to recoup court costs and attorneys fees. As it now stands, in their defense of sued officials the Justice Department frequently uses tactics intended to add to the cost of litigation by drawing out the procedures — all of which adds to the expense and discourages the use of civil litigation as a remedy. To even the situation out, Congress could determine some standard by which litigation which functions as a safeguard for constitutional rights could be subsidized.

Other Pitfalls in Litigation

These then are the remedies to the problem of intelligence community abuses of power that civil lawsuits on behalf of constitutional rights can offer. We now turn to some of the other special pitfalls on the road to a successful litigation.

Class Actions. In a class action suit, the plaintiffs sue on behalf of themselves and "others similarly situated." Such suits can redress the injury to thousands of people in one court action, which makes it an ideal vehicle for remedying the problems flowing from the "massive surveillance" and harassment programs of the intelligence community. The cost of the litigation is cut down substantially because the suit need be litigated only once, instead of repeatedly. Such broad possibilities for effective settlement make it attractive to the limited resources of public interest litigation organizations, and therefore vital to individuals who would otherwise not have the funds to carry out a lawsuit. In addition, the requirements that all members of the class of "similarly situated" people be notified means that many individuals who might not otherwise have been aware either that they had been subjected to illegal operations or that they can obtain judicial relief.

The arguments recommending filing a suit as a class action are clear. It is obtaining certification as a class action that is difficult to come by. Rule 23 of the Federal Rules of Civil Procedure requires a number of stringent criteria be met.

It must be established that the class has the following characteristics: it must have so many members that joinder of all of them (as named plaintiffs on the suit) would be impracticable; questions of law or fact must be common to all the members of the class; the named plaintiffs must have a claim which does in fact represent the entire class; and the plaintiffs must be able to establish that they "will fairly and adequately protect the interests of the class."

In addition to satisfying these criteria relative to the proposed class membership, it must also be

established that the action has the following advantages relative to the court's viewpoint. First, there would be a risk of "inconsistent and varying adjudications" if individual members of the class were to carry out separate litigation; interpretation of the law varies from one circuit to the next and when dealing with national agencies it is important that the law be as uniform as possible. Agencies should not, for example, feel that they can keep files in one circuit if another circuit prohibits maintaining the same kind of files. And second, the court must find that, in addition to considerations of judicial tidiness, a class action offers the fairest and most efficient resolution because questions of law or of fact of the class as a whole predominate over any questions affecting only individual members.

In the class actions discussed here, there are common questions at issue — a conspiracy of ongoing surveillance of lawful political activity. It is true that individual differences in damages may well exist, that one individual was subject to more intensive surveillance than another — but the general illegality of a national policy is a central issue to be established in the class action. Individual claims can be dealt with separately after the basic questions such as the constitutionality of the programs has been determined in court for the entire class.

If the class action survives these tests and is certified, then the court will direct that all members of the class who can be identified through a reasonable effort receive individual notification. This includes advising the class members of their rights: they can ask to be excluded from the class; if they do not ask to be excluded, then the judgment — whether favorable or unfavorable — will include them; and that if they do not request exclusion, a member may "enter an appearance through his counsel."

Notification presents some additional problems for the plaintiffs. Generally it is the plaintiff which must bear the cost of notification, which can be quite high for a large class. Some suits ask that defendants be required to absorb the costs instead, which makes sense for two reasons. First, in the case of secret surveillance programs and investigatory records, only the defendants know who the actual members of the class are. And second, there are privacy considerations for members of the class, many of whom might not want the fact that they had been under investigation to be known. If the defendants carry out notification, the identities of class members remain in a smaller circle.

All the cases discussed in this article have been filed as class action suits. In only one, *Berlin Democratic Club v. Rumsfeld*, has a court yet made the decision on whether to certify the class action (discussed below). In the others, the question of certification is still pending.

Sovereign Immunity. It is a matter of law that an individual cannot sue the "sovereign" (i.e., the government) unless there is a specific statute authorizing it. His or her only recourse in court is to sue the official who represented the government and who is held personally liable.

This presents serious problems in litigation. On the one hand, individual officials should be responsible for breaking laws, but on the other, it should be recognized that abuses of power would not be possible without the authority of the "sovereign" behind it. If the government cannot build in adequate safeguards against the abuse of individual discretion, it should be held liable as well. As it now stands, it is too easy for it to turn out that no one is liable. The individual official has a "good faith" defense that he or she thought the policy was actually legal (because of a national security override, for example), and yet the agency itself cannot be sued.

The Justice Department, however, has a policy of representing officials who are sued (as opposed to indicted) in their official capacities. On the one hand, it is fair that government officials as individuals be insulated from the expenses of harassing litigation to which they might be vulnerable because of implementing unpopular but legal policy. But, Justice Department thinking turns upon a contradiction: while it assumes that an official who is sued as an individual is really being sued because of government policy, at the same time the law holds that, under the doctrine of "sovereign immunity" the plaintiff cannot sue the government itself for that policy — unless there is a statute which allows a suit against the government.

In criminal cases, the Justice Department recognizes the conflict of interest inherent in both defending and prosecuting an official accused of a crime. But in the situation, as in these suits, where the government is defending an official in a civil action suing that official for implementing an improper government policy, the Justice Department finds itself in the position of defending those same questionable policies as if there were no conflict of interest. The Justice Department's position seems based on the belief that the government does not break the law — a difficult proposition to maintain. The motions in the *Driver v. Helms* case,

discussed below, provide a clear example of this kind of problem.

We now turn to the five ACLU class action suits, directed at all the major known illegal intelligence agency programs.

ACLU Class Action Suits

Mail Opening: Driver v. Helms. The illegality in the CIA mail opening program is perhaps the least controversial point of law in any of these cases. The Rockefeller Commission Report (*Report to the President by the Commission on CIA Activities Within the United States*, June 1975, Government Printing Office, Washington, DC 20402, Stock Number 041-015-00074-8, $2.85) is unequivocal that the operation was illegal. Not only are there statutes explicitly forbidding it and doubts about its constitutionality, but there was also an active conspiracy to conceal it from the public, Congress, and (apparently) a succession of Presidents. In addition to its illegality, then-Director of Central Intelligence Schlesinger ordered the project ended in 1973 because he found that from a pragmatic viewpoint it simply did not collect intelligence which was valuable enough to justify violating the laws.

Driver v. Helms, Civil Action No. 75-0225 was filed on July 22, 1975 in the District Court in Rhode Island. In response to their Freedom of Information Act request, the plaintiffs got copies of their correspondence sent to and from people in the Soviet Union. The suit is brought by Rodney Driver and others against some thirty present and former U.S. officials, sued in their individual and official capacities. The plaintiffs ask for a declaratory judgment that the activities were illegal and unconstitutional; for injunctions to prohibit defendants from carrying out such activities in the future; for an order for the destruction of the information obtained from such illegal activities; for compensatory ($20,000/letter) and punitive ($100,000/plaintiff and class member) damages; and for the costs of the suit.

The Justice Department's response to enforcing a clear and unambiguous violation of the law provides an object lesson in the government's contradictory stance. It demonstrates the need for civil litigation as a method of enforcing rights and obtaining relief independently of Justice Department action, for this case brings out some particularly clear conflict of interest issues.

The government inevitably identifies its interest more with the defendants than with the plaintiffs, and asked to be allowed to intervene in the case as a party defendant. Stating that it is carrying on a criminal investigation, the Justice Department moved for a stay of indefinite duration:

> *It is the Attorney General and the Department of Justice, and not the plaintiff, which is the agency charged by law with vindicating the important public interest implicated here, and redressing before the criminal courts any wrongdoing which may have taken place.*

The plaintiffs, however, noted that,

> *. . . in light of the conviction of two recent Attorneys-General and other Watergate-related matters, Department of Justice employees should be a bit more reserved in acclaiming themselves in the front line of freedom and liberty.*

The Justice Department was particularly concerned that court-ordered discovery would allow the plaintiffs "reckless" interference in the criminal investigation. At the same time, the government claimed that since the mail opening program had gone on for twenty years, putting aside the lawsuit for a year was unimportant. Such an attitude offers little comfort for the citizens whose files, with their private correspondence, are still being maintained and circulated. And as of yet, the Justice Department still has not brought the fact of criminal mail interception before a grand jury.

The Judge agreed with the plaintiffs and in his memorandum and order of October 17, 1975, the motion for a stay of proceedings was denied, the protective order was dissolved, and discovery proceedings ordered to go forward.

Following this order, the Justice Department responded to the inherent conflict of interest. On December 12, 1975 the Justice Department announced that it had retained nine private attorneys to represent thirty-four officials being sued, and thereby finally removed itself from the conflict of interest inherent in defending people who are at the same time under criminal investigation by the Justice Department. This is a far more equitable solution than the Department's original proposition that the suit be postponed until after the resolution of a criminal investigation and the trial which might follow.

Driver offers an example of another recurrent theme in the government's arguments in these cases: mootness. By asserting that the abuse of power is no longer going on, they argue that the

issue is moot, and there is no urgency or need to redress in civil action the wrongs done to the individuals.

Military Intelligence: Berlin Democratic Club v. Rumsfeld. In *Berlin Democratic Club v. Rumsfeld*, Civil Action No. 310-74 (D.D.C.) the plaintiffs contend that agents of military intelligence carried out a program designed to subvert the constitutional rights of American citizens living in the Federal Republic of Germany and who were in contact with American military personnel who were stationed there. Among the 16 persons and organizations who are plaintiffs are the Berlin Democratic Club (BDC — formerly called the "Americans in Berlin for McGovern" and officially affiliated with the Democratic National Party) and the Lawyers Military Defense Committee (LMDC — afilliated with the ACLU and which offered civilian representation to American servicemen). The plaintiffs charge military intelligence with illegal electronic surveillance and mail opening; infiltration of the BDC, LMDC, the Gossner Industrial Mission (affiliated with the Methodist church), and English language journals published in Germany; using military agents to disrupt the activities of these organizations and the individuals associated with them; and, to disrupt and discredit its targets, using tactics such as blacklisting, dissemination of files, termination of jobs, deportation proceedings, and spreading false rumors about the professional reputation of the LMDC. The class of plaintiffs which the case would represent is composed of all U.S. citizens who have been subjected to such programs because of their lawful and constitutionally protected political, religious, and social activities.

The case has so far been an interesting lesson in other aspects of the intelligence community activities. Originally filed in February 1974, the case's allegations were at first greeted by government denials. By September, the government had to reverse itself completely on these issues saying: "certain information . . . previously provided to this court may be erroneous." *BDC* represents a case study of a crumbling "plausible denial."

What seems to have gotten the defense into difficulty is that one end of military intelligence has little idea what the other end is doing. It turned out that an informer had been planted in the LMDC office *after* the suit was brought — a clear violation of attorney-client privilege protected by the Sixth Amendment to the Constitution. This is another example of the kind of information which can be brought out in the discovery process of civil litigation; two active duty Military Intelligence men produced, on their own initiative, affidavits for the plaintiffs outlining what was going on. When the Justice Department attorneys went to Germany to look over the situation, it was clear to them that they were in a position similar to that in the Ellsberg trial, when the prosecution at first denied that Ellsberg had been overheard on any taps. The fact later leaked out — and was confirmed — that Ellsberg had indeed been overheard, and this led to the dismissal of the case.

Now two years and an estimated $30-$40,000 into litigation, Judge Jones of the D.C. District Court has issued an order on March 17th which gets the case underway by removing the protective order which had stayed discovery. Some of the major points decided in that order are:

The decision in *Laird v. Tatum* could not be applied to *BDC*. *Tatum*, the Court held, contained "no evidence of illegal or unlawful surveillance activities" and no "clandestine intrusion by a military agent." The *Tatum* surveillance had consisted only of information collected from public meetings or from civilian agencies; but in *BDC* the plaintiffs allege that illegal surveillance, denial of employment, ruin of reputations, unfair military trails, and other covert operations. Judge Jones ruled that

> *"A surveillance operation which utilizes tactics beyond those alleged in* Laird v. Tatum *and illegitimate or unlawful in themselves . . . is justiciable."*

In addition,

> *"even legitimate surveillance activities, if undertaken in conjunction with illegitimate activities in a manner which raises the inference that the motive was intimidation or coercion, would be subject to challenge."*

As in other cases, in *Berlin* the government has contended that its housecleaning efforts — in this case new Army regulations dealing with wiretapping — mean that the need for injunctive relief from the court is mooted. In *BDC* however, the Judge found that Fourth Amendment wiretap issues were "deserving of active judicial support."

Defendants also contended that since the wiretaps had been carried out by the Federal Republic of Germany, they did not require a court order under American Fourth Amendment standards. Judge Jones held, however, that the Fourth Amendment does apply to actions by foreign officials if United States officials participated in those actions "so as to convert them into joint ventures between the United States and the foreign officials." Therefore,

"Plaintiffs are entitled to discovery of facts which would demonstrate that the FRG simply carries out the suggestions of the United States Army without meaningful review."

Importantly, the Court held that plaintiffs had stated, under the authority of the decision in *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388 (1971), which allowed for damages under the Fourth Amendment, a cause of action for seeking damages under the Sixth Amendment also.

"The right to reversal [of a conviction] on appeal, however, is far more limited an interest than the right to a fair trial . . . Reversal on appeal may ameliorate the extent of these damages; it cannot eradicate them."

Judge Jones held that if the violation of the attorney-client privilege involved in wiretapping LMDC had led to conviction, the client was entitled to damages. Therefore, the court ordered discovery to determine whether an LMDC client had in fact been injured in his criminal defense by the Military Intelligence intrusion.

However, the Court declined to certify *Berlin Democratic Club* as a class action. He found there was little likelihood of other similar litigation, by unnamed plaintiffs in Germany. And since there was therefore little likelihood of incompatible standards of conduct arising from separate adjudication of the violations, he found certification as a class action inappropriate. The court did grant the major goal of the class action however — that an injunction could be issued against similar programs being carried out: "where injunctive relief [given to plaintiffs] will run to the class at any rate, there is no need for certification of the class." Therefore, the wiretapping by U.S. agencies of U.S. citizens abroad requires a warrant issued under Fourth Amendment standards, the court invited the plaintiffs to request a temporary injunction to enforce that.

COINTELPRO: Kenyatta v. Kelley. *Kenyatta v. Kelley*, Civil Action No. 71-2595, (E.D. Pa.) is a case with a long history that shows the usefulness of discovery in civil litigation. The suit was filed in 1971 asking for relief in the form of compensatory and punitive damages for the surveillance and harassment of Muhammed Kenyatta, a black civil rights activist working in Mississippi and doing First Amendment activities such as voter registration, anti-poverty work, and community organizing.

In early 1975, documents released in discovery proceedings revealed for the first time the existence of "COINTELPRO Black." (An earlier lawsuit, *Sterns v. Richardson*, had revealed in December of 1973 the existence of "COINTELPRO Left."

The documents now released indicate that Kenyatta had been placed on the FBI "agitator index" list in late 1967 or early 1968. The program against Kenyatta consisted of intensive surveillance, a smear campaign, and a threatening letter. The FBI, for instance, provided a private individual with false and misleading information on Kenyatta which was then used to discredit his Jackson Human Rights Project and cut off its Episcopal Church funding. FBI agents also sent a threatening letter "signed" by Tougaloo College Defense Committee, to Kenyatta; as a result the Kenyatta family left Mississippi altogether.

As a result of the *Kenyatta* case, it has so far been established that there were some 540 specific COINTELPRO-Black actions intended to disrupt, misdirect, discredit, or otherwise render ineffective the political activities of American citizens or organizations; at least 362 were approved by FBI Director Hoover and implemented by the defendants named in the *Kenyatta* class action.

In November 1975 the Kenyatta complaint was amended to become a class action representing "all individuals and organizations who have at any time been targets of counterintelligence actions," i.e., victims of all the COINTELPRO activities.

The plaintiffs contend the *Kenyatta* suit now meets the criteria for certification as a class action. The predominant issue is the constitutionality of the FBI's counterintelligence program since the claims of any individual class members can succeed only if the program itself is declared unconstitutional.

If certification is granted, the April 1st directive of Attorney General Levi to notify some of the people who were the subjects of COINTELPRO actions should simplify the issue of notification of the class, since the Justice Department already intends to review FBI records and absorb the expense of a notification procedure.

The IRS "Special Services Staff": Teague v. Alexander. The plaintiffs in *Teague v. Alexander*, Civil Action No. 75-0416 filed May 25, 1975 are suing for declaratory and injunctive relief under the First, Fourth, and Ninth Amendments and the provisions of the Internal Revenue Code, 42 U.S.C. 1985. In addition to money damages, plaintiffs ask that all records unrelated to the proper administration of the tax laws be produced for destruction. They charge that the IRS "Special Services Staff" engaged in a conspiracy to deprive plaintiffs and the class they represent of equal protection under the law by using selective tax enforcement as a technique of political harass-

ment, and by developing, maintaining, and disseminating files on some 1882 individuals and 672 organizations which it determined to be politically "dissident."

In 1969 the Nixon White House apparently decided that the Internal Revenue Service was a proper tool against political dissent. H.R. Haldeman stated that Nixon "had indicated a desire for IRS to move against leftist organizations," and Tom Charles Huston inquired of an IRS defendant what IRS was doing about "ideological organizations." As a result of these suggestions, the IRS formed the Activists Organizations Committee (AOC), later restyled the euphemistic Special Services Staff (SSS), in order "to locate information tending to show activist tax violations. . . ." According to a 1972 confidential memorandum, "Special Services Staff: Its Origin, Mission, and Potential," proper subjects for the selective enforcement of the tax laws included people participating in "alleged peaceful demonstrations," and who "organize and attend rock festivals."

As a result of SSS activities in 1973, Teague was assessed $2000 in back taxes for 1961 and 1962; fortunately he still had his correct tax records and the assessment was rescinded. In early 1974, Teague was again asked to produce his tax records, this time for 1966-1972. Teague was granted a postponement, and the IRS — with the embarrassing disclosures of Watergate occurring in the interim — has not contacted Teague again.

As in the other cases dealing with now discredited programs, the IRS defendants have asserted the reasonableness of their operations, claiming that they were "entirely lawful and properly motivated" (apparently, even music lovers are a reasonably suspect class). But they have produced no body of facts to support allegations such as the 1972 confidential memorandum's statement on dissidents: "Probably their number one goal at this point is to erode, and eventually destroy, our entire tax system."

The case is currently under a protective order; in February the government's motion for summary judgment to dismiss was argued and it is expected that the case will be moving into its next phases shortly.

Operation CHAOS and Project Minaret: Halkins v. Helms. *Halkins v. Helms* (formerly *Chandler v. Helms*) Civil Action No. 75-1773 (D.D.C.) is a case organized by the Project on National Security and Civil Liberties on behalf of two overlapping classes of individuals.

The first class consists of domestic organizations and individuals engaged in lawful anti-war activities who were subjected to illegal Project Minaret surveillance by the National Security Agency (NSA) of their wire, cable, and radio communications. Minaret made use of the NSA's sophisticated computer technology to scan all wire, cable, and radio communications relating to names on watchlists provided by Operation CHAOS (CIA), the FBI, the Secret Service, the Defense Intelligence Agency, and the Bureau of Narcotics and Dangerous Drugs. Some 150,000 messages per month were read and analyzed. The information contained was then distributed to the other agencies. The program ended in 1973 when then-Attorney General Elliot Richardson wrote the NSA Director, suggesting that the recent Supreme Court *Keith* decision banning warrantless electronic surveillance of American citizens made Minaret illegal.

The second class consists of approximately 8820 people and 1000 organizations who, as a result of their constitutionally protected activities, were subjected to the "counterintelligence" actions and files of the CIA project, Operation CHAOS. According to the Rockefeller Commission Report, CHAOS had been initiated in order to collect information on anti-war activists in order to determine their "foreign links." From the beginning, however, CHAOS repeatedly concluded that there were in fact no significant foreign connections. This did not deter the CIA from exceeding its charter and setting up Operation CHAOS in order to discredit and disrupt the lawful political activities of these groups.

The relief that the suit seeks is a declaratory judgment that all aspects of CHAOS and the NSA's Project Minaret surveillance activities are illegal and unconstitutional and should be declared illegal and enjoined. As in the other suits, plaintiffs want all records on them delivered for destruction. In addition, they seek monetary damages under the provisions of the Omnibus Crime Control and Safe Streets Act ($100/day), punitive damages for each class member, and attorney's fees and court costs.

The *Halkin* suit was filed last October 28th, and it is too early to anticipate its legal developments. However, as in other cases, obtaining class action certification is a critical problem.

Conclusion: What Happens Next

Civil litigation moves slowly, and the ACLU lawsuits for illegal political surveillance are no exception. But they are moving without any serious setbacks as yet, and there is good reason to think that all the cases will be largely successful. Before Watergate, the Courts as well as the Congress took officials at their word that executive branch claims of national security or even domestic security requirements are unchallengeable. Much of this accepting attitude has evaporated and been replaced with a healthy skepticism. This new scrutiny of the old claims should lead to the establishing of favorable precedents in court for future remedies, and the new discoveries about the scope of illegal and questionable activities which result should sustain the momentum for reform which the Watergate revelations began. The time is ripe for a return to first principles.

FBI

By Sanford J. Ungar

(Little, Brown: Boston, 1976)
(682 pages $14.95)

In The Literature

Book Review

An Uncensored Look Behind the Wall

Sanford Ungar was allowed inside the FBI and this is his report on "how it works, who peoples it, and what it does." That is all he wrote — no commentary or analysis — and yet the book is all but indispensable to our understanding of the Bureau. This is in itself a significant comment on the depth of our institutional crisis; we must call a book significant simply because it tells us how our chief law enforcement agency *works*. And apparently, we must feel gratitude toward Director Kelley for letting a competent reporter "behind the walls" without, as the publisher states, "the penalties of Bureau control, censorship, or review." Once inside, Ungar uses his considerable reporting skills to flesh out the FBI bureaucracy and describe its internal workings.

The book is both unique and important. *FBI* is the first major work to focus not on Hoover but on the FBI system and, equally significant, the first effort to describe its post-Hoover posture.

While alive, Hoover was so large a presence and so much in *public* command of the Bureau that his agency and subordinates had no independant existence. Studying the Bureau after Hoover is like looking at the Kremlin after Stalin — the situation is an open-ended question: What happens now that Hoover is gone? Who is in control and what do they think? Will abusive practices end? Is the FBI marching to the beat of a different drummer? Are outside controls necessary to reform the Bureau? Do current proposals seem responsive? Will they *really* change the way the FBI system works?

Apparently in keeping with his commitment to write an "objective" book, Ungar himself does not evaluate his material or state his own conclusions. He presents only the facts. The conclusions suggest themselves.

The FBI still presents an almost impenetrable wall to outsiders. As Ungar describes the inside, it becomes evident that while Hoover may no longer sit at the "Seat of Government" he is omnipresent. He has institutionalized his persona in the rules, procedures, practices, and interpretive statements he laid down over the period of his near-forty year rule and which still govern Bureau operations and practices. It is more than symbolic that four years after Hoover, the FBI still issues statements under the heading: "Federal Bureau of Investigation" with the "Department of Justice" below. Justice Department lawyers, for example, are still dependant on the FBI to develop cases for prosecution and their access is restricted to reports "sanitized" by the Bureau. Criminal investigative priorities are still those crimes — like auto theft cases — that yield high conviction rates which make FBI statistics look good. Congressional committees still hear about the ever-ticking FBI crime clocks. The External Affairs Division still spews out "facts" to justify every Bureau action. The FBI is never wrong, even about COINTELPRO which its propaganda machine attempts to justify as a rational response to urban violence and disorder.

Ungar describes the FBI as a top-heavy bureaucracy, headed by men who rose to power either without investigative experience or who have been away from the field for so long that they no longer understand investigative work or the demands of changing times. More importantly, it is headed by men wedded to the ways of Hoover, because of either training or residual loyalty, and who invest their energies jockeying for positions and maintaining their power and privileges. Whatever Kelley's predilections, and Ungar seems to suggest they are positive and reformist in most cases, he is forced to move slowly and cautiously to maintain so-called leadership and morale. If, as Ungar sometimes suggests, the FBI is in transition, without significant outside intervention it is going to be a long term process.

The intelligence mission of the FBI is a case in point. If that mission is to be effectively reformed, FBI bureaucrats and agents must first admit that many practices were improper, illegal, or useless. Instead they resist.

For example, after Ungar promised to hold their interviews in strict confidence, field agents began to criticize Bureau practices. Ungar views this as a healthy sign for the future, but notes that not one interviewee openly criticized Hoover's vendetta against dissenters. Whether out of fear or reverence or both, this attitude extends all the way to the top. When challenged first by Ungar and then a member of Congress to acknowledge that COINTELPRO was wrong, Kelley refused. The private explanation of another Bureau official is that "he would like to say COINTELPRO was wrong, but he can't afford to offend his *constituency*." This constituency, Ungar later suggests, is other top officials who want Hoover defended at all cost. The old guard remains entrenched and this does not bode well for the prospects of internal reform.

The distance of the FBI's Washington bureaucracy from its field agents raises two other issues regarding intelligence controls. Attorney General Levi has issued Guidelines which limit, but do not prohibit, domestic spying; instead of promising reform they present the threat of fueling intelligence collection without curbing the excesses of the agents who investigate political activities of citizens.

Field agents apparently have the attitude that

In The Literature

(continued)

Headquarters consists mostly of paper shufflers and that investigative work gets done in spite of them; there is no reason to believe that restrictive guidelines churned out in Washington will alter the practices in the field. The agents that Ungar interviewed, for instance, told him without qualm that the purpose of such intelligence is still "neutralization."

Headquarters itself is still immersed in the bureaucratic syndrome of protecting jurisdiction. The Intelligence Division, swollen with agents because of Bureau preoccupation with the new left in the 1960's, is interested in spending its efforts justifying its mission and its share of the budget. It has a built-in interest in seeing all intelligence investigations as falling within those "limits" that the Levi Guidelines set up.

Ungar's bureaucratic portrait makes the search for proper guidelines seem inappropriate. Like the GAO report that found FBI domestic intelligence almost useless, Ungar's book lends itself to the idea of putting the reform knife to the whole doomed intelligence apparatus and cutting it away. Most of his effort to present a "balanced" picture of the Bureau leads him to set good deeds against bad; a long discussion of creditable FBI efforts to track down bankrobbers is set beside a long recount of FBI abuses and lawbreaking for intelligence purposes. However, he never sets up such a balance within the intelligence mission itself, where the record is always one of corrupting democratic values. The policy implication is that the FBI would be better of if it eliminated intelligence operations directed at citizens not involved in criminal acts and worked toward making the FBI a more effective institution with a new focus on important, often neglected priorities such as organized crime and white-collar fraud.

The lesson of *FBI* is that outside intervention is needed to make substantial reforms in the FBI system. This means legislation to abolish the Internal Security Branch of the FBI; legislation to limit the FBI to investigating only criminal activities that violate federal law; legislation to force the Justice Department and the Congress to exercise effective oversight of the FBI; and legislation creating a special prosecutor to resolve the question of official crime in the courts, where the issue belongs.

Ungar's *FBI* frames these issues, and includes considerable information on the history of the Bureau's mission and how Hoover built his agency. We recommend the book to both the general reader unfamiliar with the history of the Bureau and to the old Bureau watcher. The facts in *FBI* are the preface to dealing with the FBI as a system of command and control ruled, today, by Hoover's ghost.

—Jerry J. Berman

Mr. Berman is Director of the Project on Domestic Security of the Center for National Security Studies.

Recent Publications

Magazines

"Did Richard Helms Commit Perjury?" by Morton H. Halperin, *New Republic* March 6, 1976, pp. 14-17. The Justice Department has been investigating Richard Helms for over a year to determine whether, in 1973 testimony taken under oath before the Senate Foreign Relations Committee, the former Director of Central Intelligence committed perjury. Both conflicting testimony by Helms and evidence in the public record indicate that Helms misled the committee regarding U.S. intervention in Chile, CIA domestic surveillance, and the CIA role in Watergate. Because of special relationships between the Justice Department and the CIA, Halperin recommends the appointment of a special prosecutor to consider the evidence and decide whether an indictment should be sought.

"Legitimating the CIA", *New Republic*, March 6, 1976, pp. 5-6. Critiques the President's Executive Order on intelligence, concluding that 1) it would authorize activities that violate the CIA's charter — including extensive domestic investigations; 2) the President's proposed secrecy legislation would prevent leaks such as those which have brought past abuses to public view; and 3) controlling the intelligence community requires legislated charters, enforced by civil and criminal penalties, rather than executive orders.

Government Publications

Surveillance, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, 94th Congress, 1st Session. February 6, 18; March 4, 18, 21; May 22, June 26; July 25; and September 8, 1975. (2 volumes, GPO #57-282 0) The hearings examine past abuses of government surveillance and legislation requiring warrants for national security wiretaps.

Law Reviews

"Judicial Review of Classified Documents: Amendments to the Freedom of Information Act", 12 *Harvard Journal on Legislation* 415, April 1975, Argues that Congress can constitutionally authorize the courts to order the release of national security information and that the FOIA (b)(1) amendment provides "judicially manageable standards." Predicts that the courts will give great weight to executive branch claims that information should not be released and that the main impact of the (b)(1) amendment will be to ensure judicial supervision of administrative regularity under the Executive Order on classification.

Books

The My Lai Massacre and Its Cover-up: Beyond the Reach of Law?, ed. Joseph Goldstein, Burke Marshall, and Jack Schwartz (Macmillan: New York, 1976). The editors reproduce volume I of the Peers Report on the My Lai massacre — kept secret by the Pentagon for four years — showing the gap between written laws and their enforcement.

Point Of View

intelligence agencies occurred at the nexus between domestic (FBI) and foreign (CIA, NSA, etc.) intelligence agencies. The CIA mail opening program was a domestic counter-inelligence operation, which should ordinarily be the responsibility of the FBI; many FBI burglaries were conducted for NSA and other foreign intelligence agencies; and the NSA watchlists for scanning cable traffic came mainly from the FBI and other domestic intelligence agencies. A committee which is charged with preventing violations of rights within the United States must bridge this nexus by having responsibility for both the FBI and the foreign intelligence agencies.

This responsibility would have to be shared with the Judiciary Committee just as it is now shared by several sub-committees of Judiciary and Government Operations. Indeed, there is not an agency in the federal government that does not have to answer to more than one committee.

The same can be said about authorization authority over the intelligence agencies. Life would be easier for the budgeteers if Congress organized itself for their convenience, but it has not done so in many areas. Split authorizations are commonplace as are somewhat different procedures in the House and Senate. It would be nice if the House followed along and created its own intelligence committee. This could happen but the Senate need not wait; the ingenuity of budgeteers is sufficient to work out the technical details once Congress sets a policy. Such arguments should not interfere with giving the new committee control over the intelligence agency budgets. Without that authority it would not have the leverage necessary to influence the agencies behavior nor to compel the release of information.

President Ford's position is that the committee cannot be given any information unless it promises not to release it without his permission. There is simply no constitutional or political support for this position. (See *First Principles*, February 1976.)

If Congress yields on this point it will have given up the game completely. The leverage of a constitutional committee comes partly from control of the budget of an agency and partly from its ability to hold public hearings and to make information public. Without that power the committee is reduced to arguing with executive branch officials who know that the committee cannot go public and generate the support necessary to win a battle with the President.

The Senate has been almost unanimous in condemning the abuses of the intelligence agencies and in assigning some of the blame to the lack of congressional oversight. Every Senator will soon have an opportunity to demonstrate that he has learned those lessons, that is not enough to expose abuses — it is critical to build safeguards to prevent their recurrence.

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Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON,
MAY 13, 1798

Point of View

The Oversight Battle

Morton H. Halperin

The first real test of the willingness of the Senate to do anything about the intelligence agencies which have flouted the Constitution will come shortly when the Senate votes on the creation of a permanent committee to oversee the intelligence agencies.

While there is agreement that some kind of committee needs to be created, there is also intense controversy about what its powers and responsibilities should be.

The "Barons", the committee chairmen and other senior establishment Senators are resisting proposals which would take any responsibility away from the existing committees or would give the new committee the powers that it needs to have any chance of conducting effective oversight. Their preference is apparently for a committee without authorization or legislative power composed of Senators representing Armed Services, Foreign Relations, and perhaps Judiciary Committees. Such a committee would be a sham.

The "Liberals" in their struggle against the "Barons" are pressing for a committee which would have authorization and legislative authority over all national intelligence gathering — domestic and foreign — including the intelligence division of the FBI. This proposal, embodied in S. Res. 400, would give the committee the right to request all information it needs from an intelligence agency and would set up a mechanism for release of information over the objections of the President.

Three main objections are being advanced against the S.Res. 400 proposal: (1) the FBI should be excluded and left to the Judiciary Committees; (2) budgetary authority over an agency should not be split nor can the House and Senate have different systems; and (3) the Senate should not have the right to release information over the objections of the President.

On examination none of these stands up.

For many years the FBI has argued that its domestic intelligence activities were completely separate from their investigation of crimes. The division, which handles investigations of domestic organizations, counter-intelligence, and foreign intelligence gathering has a separate budget. The GAO report on these activities shows that even in the field most of the investigations are done by separate squads. It is true that in recent years there has been an effort to tie the domestic intelligence investigations to possible violations of the criminal law but they remain a separate activity within the Bureau.

More importantly, many of the abuses of the

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